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No. 88-813

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE CINCINNATI POST, a division of SCRIPPS HOWARD, INC., *et al.*, PETITIONERS

v.

GENERAL ELECTRIC COMPANY, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners have a right of access under the First Amendment to the "summary jury trial" voluntarily agreed to by the parties as part of the settlement proceedings in this private civil case.

RULE 28.1 STATEMENT

Respondent General Electric Company has the following subsidiaries (other than wholly-owned subsidiaries) and affiliates, not including subsidiaries whose shares or debt securities are not publicly held: General Electric Credit Corporation; General Electric Credit International, N.V.; Canadian General Electric Company, Ltd.; General Electric Overseas Capital Corporation; and RCA Corporation.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 854 F.2d 900. Two of the orders of the district court (Pet. App. A13-A24, A25-A31) are reported at 117 F.R.D. 597. A third order of the district court (Pet. App. A32-A34) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1988. The petition for a writ of certiorari was filed on November 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioners contend that the court of appeals erred in holding that the public has no First Amendment right of access to the so-called "summary jury trial" —a voluntary settlement device "intended for hard-core cases that defy settlement and appear destined for trial." Lambros, *Summary Jury Trials*, 13 Litigation 52 (Fall 1986). The governing legal standards are well established in this Court's jurisprudence, and the court of appeals correctly applied those standards. Settlement proceedings have always been conducted in private, under conditions designed to preserve the confidentiality of the disclosure and to enhance the candor and viability of the settlement process. They have never taken place in a fishbowl, and their efficacy would be impaired by any requirement that they occur in public. Petitioners offer no reasoned basis for treating "summary jury trials" any differently from other types of settlement proceedings or for reviewing at this juncture what is an issue of first impression in the courts of appeals.

1. *The Underlying Litigation.* This case arises out of a lawsuit involving the design and construction of the William H. Zimmer Nuclear Power Plant (the Zimmer plant) in Ohio. The plaintiffs below were three Ohio electric utilities (the Zimmer owners) that undertook jointly in 1968 to build the Zimmer plant. The defendants were Sargent & Lundy (S&L), retained in 1968 to furnish architectural and engineering services for the Zimmer plant; S&L's individual partners; and General Electric Company (GE), which in 1969 was awarded the contract to supply the nuclear steam supply system (NSSS) for the plant.

In the mid-1970s, when the Zimmer plant was nearing completion, questions were raised about possible dynamic forces within the containment surrounding the NSSS resulting from the discharge of steam into water. Accordingly, the Zimmer owners, in concert with owners of similar plants and with the assistance of GE and S&L, analyzed these "hydrodynamic loads" and subsequently redesigned and physically modified portions of the Zimmer plant in order to meet requirements imposed by the Nuclear Regulatory Commission. These modifications (and similar ones made at other plants) were completed by the early 1980s and satisfied the NRC's requirements for hydrodynamic loads. In January 1984, for reasons unrelated to hydrodynamic loads, the Zimmer plant's owners decided to convert it to a coal-fired plant.

The Zimmer owners filed the underlying lawsuit in the United States District Court for the Southern District of Ohio in July 1984, alleging that GE and S&L had breached contractual and common law duties and therefore were liable for the costs of modifying the Zimmer plant. The Zimmer owners later amended their complaint against GE to add fraud and RICO counts. Although petitioners suggest that there was great public interest in this case because it involved an allegedly "unsafe nuclear power system" (Pet. 19), the fact is that the Zimmer plant had been abandoned as a nuclear project before the lawsuit was filed, and any problem with hydrodynamic loads had been resolved several years earlier. Thus, at the time the case reached the "summary jury trial" stage, the suit was solely a commercial dispute concerning who would have to pay for changes made to the plant.

2. *The Settlement Process In This Case.* In an apparent effort to enhance their claim that "summary jury trials" are more akin to ordinary civil trials than to settlement proceedings, petitioners offer a generic description of summary jury trials that differs in several respects from the manner in which the summary jury trial in *this* case was actually conducted. See Pet. 4-8. Thus, even if some summary jury trials might take place under court compulsion, or might lead to an actual adjudication because the parties agree to accept the mock jury's "verdict," that did not happen here. This case is about a particular summary jury trial proceeding that took place voluntarily, was designed solely to assist the parties in discussing a settlement, and was conditioned on express assurances of confidentiality. We refer the Court to the court of appeals' opinion (Pet. App. A8-A9), which accurately describes both the general nature of summary jury trials and the particular manner in which the summary jury trial in this case was conducted.

a. During the course of the pretrial proceedings in this case, the district court made several attempts, all unsuccessful, to induce the parties to reach a settlement. As the trial date approached, the district court made a final effort to spur settlement by resort to the "summary jury trial." In February 1987, the court mentioned the possibility of holding a summary jury trial in September 1987, and on June 26, 1987, the court detailed the procedures that would be followed at the summary proceeding. In keeping with the nature of the proceeding as a voluntary settlement device, the court provided that:

- the parties would be represented at the summary jury trial by their chief executive officers,

"with immediate access to the corporate decision-making mechanism";

- neither the mock jury's findings nor statements of counsel or any party would be admissible as evidence should the case proceed to trial;
- unless the parties desired to arrange for a court reporter, "the proceedings will not be recorded" and "all results thereof, shall be confidential, and shall not be disclosed other than to the parties, their attorneys, consultants and insurers"; and
- the mock jurors "shall be appropriately instructed as to such confidential treatment."

Shortly thereafter, GE raised objections to participating in the summary jury trial. Although GE agreed that "every effort should be made to settle this case prior to trial through both conventional and extraordinary means," it was concerned that the danger of "highly distorted prejudicial publicity" would "inevitably harm one or more of the parties to this litigation." GE Mem. in Support of Mot. to Vacate, July 1, 1987, at 1-2. GE recognized that an actual trial would take place in public, but such a proceeding would entail a complete presentation of each side's case, with cross-examination of witnesses and the opportunity to put documents in context. By contrast, "the disclosure of fragmentary information" during a summary jury trial would give a distorted picture of the case, and the real trial might be adversely affected if the results of the summary jury trial became known. *Id.* at 2-3.

Although the district court still wanted to proceed with the summary jury trial, it recognized the legiti-

macy of GE's concerns. Accordingly, the court stated that it would "use every effort to maintain the confidentiality of the results of the summary jury trial including imposition of sanctions, if appropriate, if the outcome is improperly disclosed." R. 579 (Order Denying Mot. to Vacate, Aug. 10, 1987, at 2-3). Based on these assurances of confidentiality, GE agreed to take part in the summary jury trial proceedings.[1]

b. As noted above, the district court's order of June 26, 1987, set this case for confidential summary jury trial on September 8, 1987. Although petitioners were thus on notice for more than two months that the summary jury trial would commence on September 8 and that it would not be open to the public, they waited until September 4—the Friday before Labor Day and the last business day prior to the start of the summary proceeding—to file a motion to intervene under Fed. R. Civ. P. 24(b) for the purpose of making a First Amendment demand for access to the proceeding.

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[1] Because the district court's June 26 order contained a provision for confidentiality, petitioners argue (Pet. 9 n.5) that GE's participation in the summary jury trial was effectively compelled because "[t]he district court took no additional steps to accommodate GE when the court denied GE's motion to vacate." In fact, however, the district court's August 10 order strengthened the confidentiality provision in the June 26 order by emphasizing the court's commitment to the preservation of confidentiality, backed up by its willingness to impose sanctions for improper disclosure. Moreover, the district court expressly stated that it conducted the summary jury trial with GE's cooperation and that it closed the summary jury trial in response to GE's concerns (Pet. App. A20). The court of appeals correctly concluded, therefore, that the district court did not compel GE to participate in the summary jury trial. See *id.* at A4 n.2, A9 n.5.

Confronted with petitioners' eleventh-hour motion to intervene, and unwilling to postpone the long-scheduled summary jury trial, the district court ordered the motion briefed on an expedited basis during the first several days of the summary trial. It also requested that the parties arrange for a transcript of the proceedings to be preserved in the event that petitioners ultimately prevailed in their claim of a right of access to the summary jury trial. See Pet. App. A15.

On September 14, 1987, the district court denied petitioners' motion to intervene, holding that they had no right to attend the summary jury trial. The court observed that "[t]he summary jury trial, for all it may appear like a trial, is a settlement technique. It was designed as such and was so presented by the Court to the parties in this case." Pet. App. A20. Applying the two-part test established by this Court in *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*), the district court held that the press had no First Amendment right of access because (1) there is no tradition of access to summary jury trials or to other recognized settlement devices, which "are in a class of proceedings that have been closed to the public to best effectuate their purposes"; and (2) public access "does not 'play a particularly significant positive role' " in the functioning of the summary jury trial because "the proceeding is non-binding and has no effect on the merits of the case, other than to promote settlement." *Id.* at A24 (citation omitted).

The district court was unpersuaded by petitioners' claim that they had a substantial interest in "hear-[ing] the arguments of each side as they relate to an issue of paramount public concern." Pet. App.

A21. The court remarked that, "[w]hile this may be true, [the inability to hear these arguments] will always follow in a case that settles prior to trial on the merits. Thus, should this case settle, either pursuant to more traditional settlement techniques or the summary jury trial, the public would be precluded from hearing the actual evidence in the case." *Ibid.*[2]

Following the denial of petitioners' motion to intervene, the summary jury trial continued as scheduled. Both sides set forth their evidence in abbreviated fashion—as much for the benefit of the parties' executive officers in attendance as for the mock jury. Indeed, the district court repeatedly urged the parties to engage in settlement negotiations and met personally with their chief executive officers to discuss settlement during the course of the summary jury trial. The summary proceeding concluded on September 21, 1987, when the mock jury announced its "verdict" as to liability and damages.

c. The summary jury trial in this case had its intended effect. Settlement negotiations began dur-

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[2] On October 5, 1987, the district court amended its September 14 order (1) to incorporate an oral ruling issued on September 21, 1987, restricting communications between the mock jurors and the press and public until the case had ended, and (2) to add a provision requiring that "the list identifying prospective jurors on the panel for the summary jury trial, as well as those who actually served on the panel for the summary jury trial, shall remain sealed until the conclusion of this litigation." The court explained that "[t]o disclose [the mock jurors'] identities at this time may defeat the confidentiality of the jury's decision and would be inconsistent with our Order closing the proceedings to the public." Pet. App. A27.

ing the course of the summary jury trial. After hearing presentations of each side's case, and after receiving the mock jury's assessment of that evidence, the parties entered into a settlement of the underlying litigation. Although the district court was not required to approve the terms of the settlement in this private civil suit, the parties submitted the settlement "[a]s a courtesy to the Court." Pet. App. A33. The district court announced that it had "reviewed the settlement agreement of the parties and f[ou]nd it fair and reasonable." *Ibid.* The court then entered an order dismissing the case with prejudice. *Id.* at A34.

In addition to addressing the substantive terms and conditions of the settlement, the settlement agreement dealt with the confidentiality of the statements made and documents introduced in the summary jury trial, much of which had been subject to a comprehensive protective order negotiated by the parties and approved by the magistrate in December 1984. The parties stipulated that, with the exception of the mock verdict on the issue of liability (which was unanimously in favor of GE on all counts), the summary jury trial proceedings would continue to be subject to the restrictions on disclosure provided in the district court's previous orders. Stipulation of Nov. 20, 1987, at 2, ¶ 5. Furthermore, the parties stipulated that, subject to the district court's approval, "[t]he Order of the Court dated October 5, 1987, be amended to extend until further order of Court the period during which communication with members of the summary jury is restricted and the jury list is sealed." *Id.* at ¶ 7. All parties thus understood that, by settling this case, they were en-

suring the continued confidentiality of the summary jury trial proceedings.[3]

3. *The Court of Appeals' Decision.* The court of appeals affirmed the district court's ruling that petitioners have no First Amendment right of access to the summary jury trial. Pet. App. A1-A12. Like the district court, the court of appeals analyzed petitioners' claimed right of access under the two-part test of *Press-Enterprise II.*

The court of appeals first endorsed the district court's ruling that " 'there is no historically recognized right of access to summary jury trials' " (Pet. App. A7) (quoting *id.* at A17)). The court below observed that "[t]he summary jury trial is a device that is designed to settle disputes" (*id.* at A7-A8 (footnote omitted)) and that " 'there is general agreement that historically settlement techniques are closed procedures, rather than open.' " *Id.* at A8 (quoting *id* at A18).

The court of appeals also rejected petitioners' claim that summary jury trials are more akin to ordinary civil trials than to settlement mechanisms. As the

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[3] Continued confidentiality was particularly important because of the pendency of other cases raising similar claims against GE. See *Nebraska Pub. Power Dist.* v. *General Electric Co.*, No. 88-L-27 (D. Neb. filed Jan. 8, 1987); *Washington Public Power Suply System* v. *General Electric Co.*, No. C-85-098-AAM (E.D. Wash. filed Jan. 28, 1985). Although the plaintiffs in those cases had access to the depositions in this case, they did not have access to GE's trial strategy, demonstrative exhibits, and other materials that were disclosed at the summary jury trial. We note that an additional case raising these claims has recently been filed. *Long Island Lighting Co.* v. *General Electric Co.*, No. CV-88-2716 (LDW) (E.D.N.Y. filed Feb. 2, 1988).

court explained, there are "manifold" differences between the summary jury trial and a real trial (Pet. App. A8-A9) (citations omitted)):

> In a summary jury proceeding, attorneys present abbreviated arguments to jurors who render an informal verdict that guides settlement of the case. * * * Following short opening statements, all evidence is presented in the form of a descriptive summary to the mock jury through the parties' attorneys. Live witnesses do not testify, and evidentiary objections are discouraged. Thus, some of the evidence disclosed to the mock jury might be inadmissible at a real trial.
>
> Following counsels' presentations, the jury is given an abbreviated charge * * *. To emphasize the purely settlement function of the exercise, the mock jury is often asked to assess damages even if it finds no liability. Also, the court and jurors join the attorneys and parties after the "verdict" is returned in an informal discussion of the strengths and weaknesses of each side's case.

Thus, the court of appeals concluded that "[a]t every turn the summary jury trial is designed to facilitate pretrial settlement of the litigation, much like a settlement conference." *Id.* at A9.

The court of appeals next rejected petitioners' contention that public access would " 'play[] a significant positive role in the functioning' " of the summary jury trial. Pet. App. A9 (quoting *Press-Enterprise II*, 478 U.S. at 8). On the contrary, the court concluded that public access would seriously hamper the efficacy of the summary jury trial (Pet. App. A10):

> [W]here a party has a legitimate interest in confidentiality, public access would be detrimental to the effectiveness of the summary jury trial in facilitating settlement. Thus, public access to summary jury trials over the parties' objections would have significant adverse effects on the utility of the procedure as a settlement device. Therefore, allowing access would undermine the substantial governmental interest in promoting settlements * * *.[4]

Finally, the court of appeals stressed the nonbinding nature of summary jury trials. Distinguishing the preliminary hearing considered by this Court in *Press-Enterprise II*, the court explained that "[s]ummary jury trials do not present any matters for adjudication by the court." Pet. App. A11 (footnote omitted). "Thus, it is the presence of the exercise of a court's coercive powers that is the touchstone of the recognized right to access, not the presence of a procedure that might lead the parties to voluntarily terminate the litigation." *Ibid.*[5]

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[4] The court of appeals also dismissed petitioners' claim of a public "right to know" about what occurred at the summary jury trial. The court of appeals recognized, as had the district court, that the public has no First Amendment right to observe any negotiations leading to a traditional setlement of the case, and the parties have no constitutional obligation to reveal the content of the negotiations. The court saw no reason to reach a different result in the context of the summary jury trial. Pet. App. A11.

[5] Judge Edwards concurred in the majority's holding that petitioners have no First Amendment right of access to the summary jury trial itself, but did "not agree that the record can appropriately continue to be sealed after a settlement has been effected." Pet. App. A12.

ARGUMENT

The court of appeals correctly held that petitioners have no First Amendment right of access to the summary jury trial in this private civil case. This decision, which resolves an issue of first impression, does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Before turning to petitioners' legal arguments, we note that there are a number of prudential reasons that support denial of the petition in this case. First, petitioners do not even suggest that there is a difference of opinion, much less a conflict, among the lower courts with respect to either of the questions they purport to present. Petitioners do not allege that any court has ever held that settlement proceedings—whether the "summary jury trial" in this case or some other form of non-adjudicatory dispute resolution mechanism—must be opened to the public under the First Amendment.

Second, the principal question that petitioners ask this Court to review rarely arises in practice. Indeed, petitioners have not cited a single other instance in which the press or public has sought access to a summary jury trial. Thus, there has been no occasion for the lower federal courts to consider whether, if the parties have a legitimate interest in maintaining the confidentiality of the summary jury trial, the proceeding should be closed. If the question of public access to summary jury trials ever arises again, there will be time enough for this Court to consider the issue with the benefit of the views of other lower federal courts.

Finally, contrary to petitioners' contention (Pet. I (Question 1); Pet. 13 & n.10), there is no occasion in this case to consider the broad question whether a First Amendment right of access applies to adjudicatory hearings in civil cases. GE argued below not that the First Amendment is inapplicable to all court proceedings in civil litigation, but that any supposed right of access does not extend to settlement discussions and mechanisms, even if a judge and "mock jury" participate in that process. The court of appeals in turn analyzed petitioners' claim under the same test that this Court has fashioned in the criminal context, where a right of access is recognized. Since the court below nonetheless rejected petitioners' claim, despite giving them the benefit of this more favorable test, this is hardly the case in which "to resolve the important issue of whether [a right of access] applies in civil cases" (Pet. 13).

2. Turning to the merits, it is telling that petitioners studiously avoid even mentioning the two-part *Press-Enterprise II* test under which the courts below correctly analyzed the claimed right of access in this case. Indeed, petitioners fail to offer *any* analytic framework under which right-of-access claims should be considered; instead, they advance only the argument that public confidence in the judicial system would somehow be enhanced if petitioners were granted access to summary jury trials. That conclusory generalization, however, ignores the essential nature of the summary jury trial as a settlement device.[6] As the courts below properly concluded, peti-

[6] It bears repeating that the summary jury trial, if successful, leads only to voluntary settlement by the parties; thus, public access is wholly unnecessary to promote public confi-

tioners have no First Amendment right to be admitted to a court-sponsored settlement process that (1) is totally lacking in any tradition of public access, (2) does not adjudicate anyone's rights, and (3) would be seriously impaired if it had to be opened to the public.

a. There is of course no historically recognized right of access to settlement proceedings. Rather, they almost always are conducted in private, and the terms of the settlements themselves are usually confidential. See, *e.g.*, *Palmieri* v. *New York*, 779 F.2d 861, 865 (2d Cir. 1985) (" '[s]ecrecy of settlement terms * * * is a well-established American litigation practice' " (citation omitted)); *Minneapolis Star & Tribune Co.* v. *Schumacher*, 392 N.W.2d 197, 204 (Minn. 1986). Indeed, settlements often could not be reached without confidentiality. See, *e.g.*, *id.* at 205; *In re Franklin Nat'l Bank Sec. Litig.*, 92 F.R.D. 468, 470, 472 (E.D.N.Y. 1981) (Weinstein, J.), *aff'd*, 677 F.2d 230 (2d Cir. 1982). And the desire to maintain confidentiality is frequently a motivating factor in achieving a settlement. See, *e.g.*, *Schumacher*, 392 N.W.2d at 205 ("[o]ne of the reasons parties agree to settle is that they do not wish to go to trial and expose their disputes to the public").

Cognizant of both the public interest in fostering settlements and the nature of the settlement process, the law has long accorded special protections to settlement discussions and agreements in order to en-

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dence in the judicial system. Fairness is assured, as with other commercial contracts, by the fact that the settlement is the product of arms' length bargaining by fully represented parties.

courage the voluntary resolution of disputes. Courts have explicitly rejected claims for access to the fruits of settlement proceedings or to the materials or documents relied upon by the parties while engaged in the settlement process. See, *e.g.*, *Schumacher*, 392 N.W.2d at 205 (applying *Press-Enterprise II* analysis to find no right of access to settlement documents in private civil litigation, even where documents were part of court record); *In re Franklin Nat'l Bank*, 92 F.R.D. at 470 (access to sealed documents refused because their continued confidentiality was vital component of settlement agreement). See also Fed. R. Evid. 408 and Advisory Committee Notes; Fed. R. Civ. P. 16 (c)(7) and 1983 Advisory Committee Notes; Fed. R. Civ. P. 68. Thus, the complete absence of any tradition of public or press access to settlement proceedings, whether they be the modern-day summary jury trial or a more traditional in-chambers settlement conference, requires the rejection of petitioners' claim of a right of access to the summary jury trial in this case.

b. Nor do petitioners fare any better under the second prong of the *Press-Enterprise II* analysis. This Court has recognized that some proceedings would be "totally frustrated if conducted openly" (*Press-Enterprise II*, 478 U.S. at 9). See, *e.g.*, *Branzburg* v. *Hayes*, 408 U.S. 665, 684 (1972) (grand jury and other proceedings). That is the case with the summary jury trial. Not only would public access not play a significant positive role in the functioning of the summary jury trial, it would actually be detrimental to the process and impair its utility as a settlement device.

Where, as here, a party has a legitimate interest in confidentiality, a requirement of public access

would in all likelihood result in there being no summary jury trial at all. As the Seventh Circuit recently held, a federal district court cannot compel a party to participate in a summary jury trial. *Strandell* v. *Jackson County*, 838 F.2d 884 (7th Cir. 1987). Indeed, the summary jury trial in this case was conducted only with the consent of the parties. See Pet. App. A4 n.2, A9 n.5. Accordingly, a party strongly valuing confidentiality would simply not agree to a proceeding that is open to the public; the result would be not an increase in the public's knowledge but an abandonment of a useful and important technique for resolving disputes without trials and appeals. See *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 472-473 & n.12 (1984); *Upjohn Co.* v. *United States*, 449 U.S. 383, 395 (1981).

Even if courts had the power to compel involuntary participation in a summary jury trial, many judges undoubtedly would be reluctant to do so at the expense of a party's legitimate interest in confidentiality. Most judges would realize that it is a high price to exact, in the hopes of settling a case, to require a party to disclose confidential business information, or to damage its position in other pending or potential suits by premature revelation of its trial strategy, or to subject itself to public misunderstanding and even financial injury based on an incomplete evidentiary record—typically, the unsworn "summaries" tendered by opposing counsel.

The likeliest outcome in such circumstances is that the parties would resort to other procedures designed to resolve disputes without a trial, such as court-annexed arbitration or "mini-trials" before a neutral observer selected by the parties. See Lieberman &

Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. Chi. L. Rev. 424, 427-428 (1986); *Annual Judicial Conference of the Second Judicial Circuit of the United States*, 101 F.R.D. 161, 222, 223, 233 (1983). These techniques—similar to but less effective than the summary jury trial—are private processes from which the press and the public unquestionably may be excluded.

Even if the summary jury trial is held, the loss of confidentiality would limit its utility as a settlement device. The fishbowl atmosphere may cause public relations concerns to dominate settlement objectives, altering the character of the presentation in ways that are difficult to predict. A party, in order to maintain the secrecy of its trial strategy or sensitive business information, may in good faith pursue an approach at the summary jury trial that is different from the one it plans to take at the actual trial. Public access would therefore give impetus to the tendency to divorce the presentation at the summary jury trial from that at the actual trial and thus, by reducing its predictive value, diminish the effectiveness of the summary jury trial as a settlement device.

Finally, even if the conduct of the summary jury trial itself remained unaltered, public disclosure of its outcome could affirmatively impair the prospects for settlement of the litigation. Especially in controversial cases or cases of substantial monetary importance, public knowledge of the outcome of the summary trial might actually harden the positions of the parties. Such a consequence of public access hardly furthers the salutary purpose of the summary jury trial.

Against these disadvantages, any claim that petitioners' presence would play "a significant positive

role" in the functioning of the summary jury trial—a claim that petitioners, in their desire to avoid coming to grips with *Press-Enterprise II*, do not even make—would be untenable. To the contrary, recognition of a right of public access would reduce the utility of this settlement technique while producing little or no gain in public information about the judicial process. The First Amendment does not require such a perverse result.[7]

2. While ignoring the analytic framework established in *Press-Enterprise II*, petitioners make the wholly unsupported allegation (Pet. 16-17) that summary jury trials are akin to proceedings in which this Court has upheld a public right of access because they "play a similarly decisive role in civil litigation." *Id.* at 16. Petitioners are plainly wrong. In each instance in which this Court has found that tradition supports a First Amendment right of access, the proceeding at issue has resulted in a binding judicial determination that directly affected the rights of the parties. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980) (trial); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982)

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[7] Petitioners also intimate (Pet. 19) that their right to attend the summary jury trial in this case somehow derives from the public importance of the issues in the underlying lawsuit between GE and the Zimmer owners. It is well settled, however, that the First Amendment right of access is not a right to know the details of any particular private dispute, but a right of the public, within the confines of the *Press-Enterprise II* test, to learn about the workings of the judicial process. See *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 606 (1982); *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1337 n.9 (D.C. Cir. 1985) (Scalia, J.) ("the public interest in obtaining news is [not] the focus of the inquiry in right-of-access cases").

(trial); *Press-Enterprise Co.* v. *Superior Court* (*Press-Enterprise I*), 464 U.S. 501 (1984) (jury voir dire); *Press-Enterprise II* (probable cause preliminary hearing).

In contrast, the summary jury trial does not present any matter for adjudication by the court. Settlement proceedings, even if conducted under judicial auspices, are designed to avoid entirely the need for invoking the adjudicatory powers of the courts; *nothing that happens during settlement proceedings, including a summary jury trial, can affect a party's legal rights without its consent.* Here, for example, the district court established rules for the summary jury trial guaranteeing that the proceeding would have no adjudicative or coercive effect on the parties. See page 5, *supra*. And, as with a judge's preliminary assessment of the evidence at a settlement conference, no enforceable rights arose out of the mock jury's verdict. These crucial factors make this case totally unlike any of the prior cases in which a First Amendment right of access has been recognized.

Petitioners nevertheless argue that the summary jury trial is like a traditional judicial "adjudication" because the parties are compelled to attend the proceeding, the parties may stipulate to be bound by the mock jury's verdict, and, in this case, the district court formally approved the parties' settlement stipulation. None of these factors transforms the summary jury trial into an adjudicative proceeding.

First, petitioners' assertion (Pet. 7) that the parties may be compelled to participate in a summary jury trial misstates the law and ignores what occurred in this case. See page 17, *supra*. In any

event, even if petitioners were correct that a court may compel parties to participate in this—or any—type of settlement mechanism, the court's triggering role would not create a First Amendment right of access to the ensuing presentations. For example, parties are obligated by the Federal Rules of Civil Procedure to participate in discovery, but this Court held in *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984), that there is no First Amendment right of access to discovery materials. Similarly, parties may be compelled to participate in traditional in-chambers settlement conferences, yet it would be ludicrous to suggest that the public has a right to demand access to those proceedings.

Second, petitioners' reliance (Pet. 4-5) on the parties' ability to stipulate to be bound by the mock jury's verdict is wholly unwarranted. No such stipulation was ever entered in this case, so petitioners' argument was a red herring even when it was first advanced in the district court. But the argument was rendered completely frivolous by the elimination, at the district court's suggestion (Pet. 10-11), of the provision in question.

Finally, the summary jury trial cannot be characterized as an adjudicative proceeding simply because the parties subsequently entered into a settlement that was approved by the district court. See Pet. 12, 17. In ordinary civil litigation between private parties, settlement is solely in the hands of the litigants; here, too, the district court played only a traditional settlement role. The court's approval of the settlement was not required by statute or rule. See, *e.g.*, *United States* v. *City of Miami*, 614 F.2d 1322, 1330 & n.16 (5th Cir. 1980), modified on reh'g, 664 F.2d

435 (1981). And it goes without saying that the public's right of access cannot be made to depend upon events that may or may not occur after the summary jury trial has ended.

3. With great flourishes of hyperbole, petitioners make much of the plainly unremarkable fact that the courts below recognized the practical necessity of restricting communications between the mock jurors and the press and public. See, *e.g.*, Pet. 3, 13. Petitioners' arguments are unavailing, for the restrictions simply preserve the legitimate confidentiality of the summary jury trial that, as demonstrated above, is fully consistent with the First Amendment. As the district court recognized, disclosure of the identity of the mock jurors would totally undermine the basis and purpose of the original order closing the summary jury trial. Pet. App. A27.

Petitioners' argument that they are entitled to interview the mock jurors completely ignores the special nature of a non-public summary jury trial. Petitioners' reliance on the "'public character of [jury] proceedings'" (Pet. 18 n.12 (quoting *Press-Enterprise I*, 464 U.S. at 506)) erroneously presupposes that this was actually a jury trial in which the "veniremen" were performing their fact-finding function under the Seventh Amendment. Here, however, the restrictions on juror communication were imposed for the sole purpose of maintaining the confidentiality of a *closed* proceeding that was specifically structured to aid the parties in assessing possible settlement alternatives. Once it has been determined that this type of settlement mechanism may lawfully be closed to the public, the restriction on communications between the mock jurors and the

press flows naturally from the need to preserve that legitimate confidentiality.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] Petitioners also uncritically—and incorrectly—assume (Pet. 18 n.12) that their asserted right to obtain information from the mock jurors is fundamental to the protections of the First Amendment. However, even with respect to actual trials, courts have noted "the tenuous nature of the first amendment interest articulated on behalf of the press with regard to an order restraining, not the press, but trial participants." *Radio & Television News Ass'n* v. *United States District Court*, 781 F.2d 1443, 1445 (9th Cir. 1986). A "first amendment right of full access to trial participants * * * is not supported by constitutional case law," and "the media's collateral interest in interviewing trial participants is outside the scope of protection offered by the first amendment" (*id.* at 1446, 1447). Moreover, "[f]ederal courts have generally disfavored post-verdict interviewing of jurors." *Haeberle* v. *Texas Int'l Airlines*, 739 F.2d 1019, 1021 (5th Cir. 1984). These considerations are even more applicable in the case of "mock jurors" at a "summary jury trial."